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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ROGER MUNYORORO,

Defendant and Appellant.

D073906

(Super. Ct. No. SCD242388)

APPEAL from a postjudgment order of the Superior Court of San Diego County,
Eugenia A. Eyherabide, Judge. Affirmed.

Lindsey M. Ball and Siri Shetty, under appointment by the Court of Appeal, for
Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Marvin E.
Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

Roger Munyororo was convicted by guilty plea of being a felon in possession of a firearm. (Pen. Code, § 29800, subd. (a)(1).)¹ In this single-issue appeal, he claims he is entitled to additional presentence custody credit for the period between August 2 to October 9, 2012.² As we explain, Munyororo did not meet his burden to show he was incarcerated during this time for the "same conduct" for which he was sentenced. (§ 2900.5, subd. (b).) He is therefore not entitled to custody credit for that 69-day period, and we affirm the postjudgment order denying his request.

FACTUAL AND PROCEDURAL BACKGROUND

Munyororo was on parole following his conviction for a 2008 robbery attempt. On August 2, 2012, San Diego Police Department officers stopped and arrested him for unlawful firearm possession, falsely identifying himself to officers, and related crimes. From a booking photo, they determined Munyororo was a parolee at large.³ He was charged in this case, San Diego County Superior Court No. SCD242388 (case 388) with being a felon in possession of a firearm (§ 29800, subd. (a)(1), count 1) and giving false information to a peace officer (§ 148.9, subd. (a), count 2). The charging document further alleged Munyororo had suffered a prison prior (§§ 667.5, subd. (b) & 668) and a prior strike (§§ 667.5, subs. (b)–(i) & 1170.12).

¹ Further statutory references are to the Penal Code.

² Munyororo withdrew his claim for 110 days of custody credit and 16 days of conduct credit covering a different period of incarceration.

³ A parolee at large is "an absconder from parole supervision, who is officially declared a fugitive by board action suspending parole." (Cal. Code Regs., tit. 15, § 2000(b)(75).)

On October 9, Munyororo posted bail and was released from custody. He was arrested in November for aggravated assault and related offenses, triggering new charges in San Diego County Superior Court No. SCD244642 (case 642).

In January 2013 in case 388, Munyororo pleaded guilty to being a felon in possession of a firearm (§ 29800, subd. (c)(1)) and admitted a prior strike (§§ 667, subds. (b)–(i) & 1170.12). In case 642, he pleaded guilty to assault by means likely to produce great bodily injury (§§ 245, subd. (a)(4) & 12022.7, subd. (c)) and admitted certain felony priors. All remaining charges and allegations in cases 388 and 642 were dismissed.

At a joint sentencing hearing, the court imposed a total prison term of 15 years, four months: a 14-year term in case 642 and a consecutive term of one year, four months in case 388. The probation department recommended no presentence credit in case 388 for Munyororo's confinement between August 2 and October 9, 2012, noting he had been booked on a parole hold during that period for "the use of methamphetamine and PCP" in addition to the conduct for which he faced sentencing. The trial court awarded no credits against the sentence in case 388 for that 69-day period.

Munyororo filed a letter in June 2014 asking the court to correct his credits in cases 642 and 388. The court amended the minute order in case 388 to reflect that Munyororo had received appropriate custody credit under *People v. Bruner* (1995) 9 Cal.4th 1178 (*Bruner*) and that any associated conduct credit was limited to 15 percent under section 2933.1. A second request to correct the credit award in March 2018 was denied as duplicative.

DISCUSSION

Munyororo argues he is entitled to custody credit and associated conduct credit in case 388 for his presentence restraint from August 2 to October 9, 2012. As we explain, Munyororo has not met his burden to establish his right to credit.

"Everyone sentenced to prison for criminal conduct is entitled to credit against his term for all actual days of confinement solely attributable to the same conduct." (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) Presentence "credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted." (§ 2900.5, subd. (b).) Courts have interpreted the "same conduct" requirement in the statute to require strict causation: where "a period of presentence custody stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a 'but for' cause of the earlier restraint." (*Bruner, supra*, 9 Cal.4th at pp. 1193–1194.) In other words, a defendant must show "the *conduct* leading to the sentence was the *true and only unavoidable* basis for the earlier custody." (*Id.* at p. 1194.)

A defendant bears the burden to establish his or her entitlement to presentence custody credit. (*People v. Shabazz* (2003) 107 Cal.App.4th 1255, 1258 (*Shabazz*).) That includes the burden to prove but-for causation. (*Bruner, supra*, 9 Cal.4th at p. 1191;

People v. Purvis (1992) 11 Cal.App.4th 1193, 1195.) As the parties jointly urge, we will review the credit issue in this appeal de novo.⁴

On August 2, 2012, Munyororo was arrested and booked for providing false identification to an officer, being a felon in possession of a firearm, carrying a concealed firearm, and being a gang member carrying a concealed firearm. At the time of his arrest, he was already a parolee at large. A parole hold was placed on him for the crimes above *and* for the use of methamphetamine and PCP. There was no evidence he used those drugs on August 2 in connection with the firearm offenses, and his status as a parolee at large was unrelated to the conduct leading to his conviction. Accordingly, Munyororo did not meet his burden to show that the conduct underlying his firearm conviction was the but-for cause of his incarceration from August 2 to October 9.

Munyororo acknowledges that drug use served as an additional basis for his parole hold, but maintains he was ultimately charged "with the most severe of these offenses." That is not the standard. To prove eligibility, Munyororo had to show the conduct leading to his sentence on the firearm conviction "was the *true and only unavoidable* basis" for his restraint. (*Bruner, supra*, 9 Cal.4th at p. 1192.) Because his parole hold rested partially on unrelated drug use, Munyororo did not meet that standard.

⁴ Whether a defendant's earlier confinement was solely attributable to the same conduct for which he faces sentencing could present a question of fact. But here, the court made no factual findings. The issue presented here "involves application of a statute to undisputed facts and is subject to our independent review." (*People v. Anaya* (2007) 158 Cal.App.4th 608, 611.)

Munyororo next urges us to find an exception to *Bruner's* strict causation rule, claiming there was no separate adjudication for his drug use parole violation, nor evidence he received credit for those 69 days in another proceeding. To deny him credit, he maintains, would render the period "dead time." He relies on *In re Marquez* (2003) 30 Cal.4th 14 (*Marquez*), in which the Supreme Court recognized an exception to *Bruner's* strict causation rule in certain cases not involving a possibility of duplicate credit. As we explain, *Marquez* is distinguishable.

The defendant in *Marquez* sought custody credit for a period attributable to criminal charges in two counties. He was charged with burglary in Monterey County and released on bail. When Santa Cruz officers arrested him for unrelated crimes, Monterey placed a hold on his custody status. The Santa Cruz County charges were later dismissed after the conviction was reversed on appeal. The Monterey County judge granted credit for time the defendant spent in custody between the Monterey hold and his sentencing in Santa Cruz. But it denied him credit for the period between his sentencing in Santa Cruz and his sentencing in Monterey. (*Marquez, supra*, 30 Cal.4th at pp. 17–19.)

The Supreme Court reversed. Once Santa Cruz County dropped its charges, his custody time was attributable solely to the Monterey County hold. Under the plain language of section 2900.5, subdivision (b), the defendant was entitled to credit. (*Marquez, supra*, 30 Cal.4th at pp. 22–23.) The court rejected the People's argument that strict causation rule precluded this result. That rule "is applicable in cases involving the possibility of *duplicate credit* that might create a windfall for the defendant." (*Id.* at

p. 23.) There was no possibility of a duplicate custody credit award because the Santa Cruz charges had been dismissed. (*Ibid.*)

Here, by contrast, there *was* a possibility of duplicate credits. Munyororo was a parolee at large at the time of his August 2 arrest. His parole hold was based on alleged drug use that was unrelated to the firearm possession. He offered no evidence that parole authorities would not have issued a hold but for his arrest in this case. (*Bruner, supra*, 9 Cal.4th at p. 1194.)⁵ He likewise did not show that parole authorities had dismissed "all grounds for revoking parole other than the conduct underlying his current conviction." (*People v. Kennedy* (2012) 209 Cal.App.4th 385, 392.) Parole violation proceedings have undoubtedly concluded by this point. Yet Munyororo has not sought judicial notice of those proceedings on appeal or shown that parole was revoked, but he was denied credit for those 69 days in custody. On this record, Munyororo has not shown that a denial of custody credit results in "dead time" to invoke the language in *Marquez*. (30 Cal.4th at pp. 20–21.)

Munyororo claims in his reply brief that he "was never separately adjudicated on a parole violation regarding to alleged use of PCP or methamphetamine." The record admittedly says little about his parole violations. All we have is a single line in the probation report prepared before sentencing, which indicates Munyororo was a parolee at large at the time of his August 2 arrest and was placed on parole hold for both the

⁵ *Bruner* acknowledged the difficulty defendants might have in proving this negative, but noted an alternative would allow endless credit windfalls. (*Bruner, supra*, 9 Cal.4th at p. 1193.)

conduct leading to this conviction and for drug use. The record is silent whether Munyororo requested a parole revocation hearing, or any result of that hearing. Nevertheless, the *absence* of evidence does not entitle him to presentence custody credit. Instead, Munyororo bears the burden to affirmatively show his entitlement to such relief. (*Shabazz, supra*, 107 Cal.App.4th at p. 1258.)

Shabazz, supra, 107 Cal.App.4th 1255 is instructive. A defendant was in custody on a pending forgery charge and for unrelated parole violations that preceded that charge. He was convicted of forgery and sentenced. As of his sentencing, he had yet to have a hearing on the parole revocation. The trial court awarded presentence custody credit, but the appellate court reviewed the issue sua sponte and reversed. (*Id.* at p. 1257.) The defendant claimed on appeal that he was entitled to credits because the record was silent as to whether his parole had been or would be revoked. If parole was not revoked, he claimed he would be denied any credit for that presentence period. (*Id.* at pp. 1258–1259.) The court rejected his claim, explaining that if the parole violations were dismissed, or if parole were revoked and the parole authority denied credits, the defendant could later seek modification of the presentence credit order under *Marquez*. (*Id.* at p. 1259.)

Here, as in *Shabazz*, there was a possibility of duplicate credit, and the trial court properly applied *Bruner's* strict causation rule. If Munyoyoro ultimately faces the

hypothetical he posits, he may seek a modification of presentence custody credits.

(*Shabazz*, *supra*, 107 Cal.App.4th at p. 1259.)⁶

DISPOSITION

The order is affirmed.

DATO, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.

⁶ Prisoners receiving a determinate sentence are eligible for up to two days of conduct credits for every two days of presentence custody. (§ 4019, subd. (f); *People v. Whitaker* (2015) 238 Cal.App.4th 1354, 1358.) Conduct credits are limited to 15 percent of the actual period of confinement for persons convicted of a "violent felony" as defined in section 667.5, subdivision (c). (§ 2933.1, subd. (c); *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1184.) Because Munyororo is not entitled to any custody credit for his presentence incarceration between August 2 and October 9, he is also not entitled to conduct credit for that period. We need not decide whether such credits are appropriately determined under section 4019 or section 2933.1.